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No. 03-1599

IN THE

Supreme Court of the United States

CITY OF MESA,

Petitioner,

v.

CRAIG W. PETERSEN,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

REPLY TO BRIEF IN OPPOSITION

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Respondent concedes that "[i]t is true that the Arizona Supreme Court's opinion directly conflicts with numerous opinions by federal circuit and federal district courts, and with some decisions by state appellate courts." (Brief in Opposition ("Opp.") 3.) He further concedes that the court's opinion is "radically different from the result one would expect from almost all other lower courts." (*Id.*) Respondent requests this Court grant the Petition in order to bring "coherence and rationality to an unsettled area of constitutional law." (*Id.* at 1.)

While Respondent first claims that this case involves an unsettled area of constitutional law (*Id*), he subsequently claims that this case is in "full harmony" with this Court's "definitive interpretation" of these issues (*Id.* at 3). Respondent's concept of "full harmony," however, rests upon his

assertion that the profession of firefighting is no more safety sensitive than "librarians stacking heavy books" or "janitors waxing floors." (*Id.* at 8.) And this "full harmony" is premised on snippets from the "dissents in several of this Court's urinalysis cases." (*Id.* at 1.) The Arizona Supreme Court's decision, in actuality, is in dissonance with principles established by this Court and in direct conflict with numerous district court decisions. The Brief in Opposition (a misnomer since it supports the granting of the Petition) attempts to justify the Arizona Supreme Court's decision by ignoring the court's newly created balancing test and by focusing on fragments from dissenting opinions of this Court.

I. *CHANDLER V. MILLER* DOES NOT CONTROL THIS CASE.

Respondent adopts the position that firefighters' duties involve the same type of safety issues as shelving books and waxing floors in an attempt to make it appear as if the Arizona Supreme Court's decision is in "full harmony" with this Court's decision in *Chandler v. Miller*, 520 U.S. 305 (1997). No such harmony exists. In *Chandler*, this Court applied the special needs balancing test to a Georgia law requiring drug testing—within a specified time period before qualifying for a ballot—of candidates for state offices. Unlike the professions where this Court has upheld drug testing—*National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (customs agents) and *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (railroad employees)—*Chandler* involved political candidates that "typically do not perform high-risk, safety-sensitive tasks." 520 U.S. at 321-22. And, as this Court observed, the conduct of political candidates seeking to be put on a ballot does not genuinely place the public safety in jeopardy. *Id.* at 323.

Respondent's position that the firefighting profession is no more safety sensitive than menial tasks performed by

custodians and librarians is unsupported by any case law cited by him and is contrary to case law he relies on. For example, the Brief in Opposition cites with approval *Anchorage Police Department Employees Ass'n v. Municipality of Anchorage*, 24 P.3d 547 (Alaska 2001), but fails to observe that this court found "[f]ire [f]ighters undeniably hold safety-sensitive positions." *Id.* at 555. Even the Arizona Supreme Court's opinion does not support Respondent on this issue. The court's decision (1) cites with approval the Alaskan decision that found the profession to be safety sensitive, (Pet. App. 15a.); (2) implicitly acknowledges the profession is safety sensitive, (*Id.* at 7a.); and, (3) describes the profession as safety sensitive (*Id.* at 12a.). Other courts have found the profession to be so safety sensitive that it provided a "compelling interest" to allow testing. *See, e.g., Hatley v. Department of Navy*, 164 F.3d 602, 604 (Fed. Cir. 1998); *see also Penny v. Kennedy*, 915 F.2d 1065, 1067 (6th Cir. 1990) ("Chattanooga has a compelling interest in ensuring that the duties of fire fighters . . . are performed free of any risk of impairment by the use of illegal drugs").

Here, unlike *Chandler*, the profession of firefighting exemplifies safety-sensitive tasks: firefighters operate large emergency vehicles at high speeds; have access to and administer numerous types of life-saving drugs;[1] administer invasive medical treatment, such as emergency endotrachael intubation, I.V. administration, and cricothyrotomies; provide life-saving medical support, such as CPR, defibrillation, cardiac monitoring, and advanced life support for trauma and drowning victims; respond to bomb threats, building collapses, and hazardous material spills; respond to drug

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[1] Mesa's fire department maintains and administers the following drugs: adenosine, albuterol, atropine, calcium chloride, diazepam, dopamine, epinephrine, etomidate, ipratropium, lasix, lidocaine, magnesium sulfate, methylprednisolone, narcan, nitroglycerin, oxytocin, sodium bicarbonate, sodium succinate, succinolcholine, verapamil, and versed.

overdose and suicide calls; investigate arson scenes; provide assistance in combating forest fires; respond to and defend large fires in other states; and respond to burning buildings in their own municipalities to rescue victims and protect property.

Respondent equates the profession of firefighting to librarians stacking books and custodians waxing floors so as to make the profession appear more like politicians seeking a state office and somehow significantly different than duties performed by customs agents (*Von Raab*) and train engineers (*Skinner*). For it is only in Respondent's world where the safety issues in shelving books equates to driving a speeding fire truck, administering life-saving drugs, performing emergency cricothyrotomies, etc., that the Arizona Supreme Court's opinion harmonizes with this Court's precedent. In *Chandler*, this Court appropriately applied the special needs balancing test to a profession[2] that typically does not involve safety-sensitive tasks. But, here, the Arizona Supreme Court created its own test for a profession that epitomizes safety sensitive. The decision conflicts with principles established by this Court; and, as acknowledged by Respondent, it "directly conflicts with numerous opinions by federal circuit and federal district courts." (Opp. 3.)

II. THE ARIZONA SUPREME COURT CREATED NEW PREREQUISITES TO THE SPECIAL NEEDS BALANCING TEST IN CONFLICT WITH THIS COURT.

According to the Arizona Supreme Court (Pet. App. 8a) and the Brief in Opposition (pp. 4, 20-21) there is no risk, danger, or public safety issue until there is documented drug abuse resulting in accidents or injuries. In so concluding, the

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[2] The term profession is used loosely to describe politicians seeking to be put on a ballot.

court created new prerequisites to the special needs balancing test that must be satisfied before a sufficient governmental interest to test can be found: (1) there must be documented drug abuse (Pet. App. 8a); (2) there must be "accidents, fatalities, injuries or property damage" for there to be a "real and substantial risk" (*Id*); and, (3) there must be documentation of drug abuse within the specific department seeking to implement the drug testing policy (*Id*). This newly created balancing test with prerequisites is contrary to principles established by this Court, and it will create inequitable results.

First, this Court has rejected the prerequisite of having to show documented evidence of a drug problem in order to establish a sufficient governmental interest to test. *Von Raab*, 489 U.S. at 673-75.

Second, the Arizona Supreme Court's decision and the Brief in Opposition fail to make the following distinction, which this Court has made: When there is no drug abuse evidence concerning a profession that is fraught with potential risks and dangers to the public, there still may be a real and substantial risk to the public and a "compelling interest in ensuring that . . . [these] employees do not use drugs." *Von Raab*, 489 U.S. at 674. But when the profession does not involve "high-risk, safety-sensitive tasks" and there is no "indication of a concrete danger"—such as being a political candidate seeking to be on a ballot—there is no compelling interest and no special need to test. *Chandler*, 520 U.S. at 319, 321-22. Instead of recognizing this distinction, the Arizona Supreme Court's decision incorrectly equates "compelling interest" and "real and substantial risk" to documented catastrophes caused by drug abuse.

Third, as discussed in the Petition (pp. 17-18) and an Amicus Brief,[3] requiring documented evidence spawns numerous issues as to what is a sufficient quantum of evidence. And even if the initial quantum is met, what occurs after months, years, or decades of a department testing clean?

Fourth, requiring documented evidence makes an individual's Fourth Amendment rights substantially dependent on the conduct of others. In other words, if documented evidence is a prerequisite in determining whether there is a sufficient government interest, the past conduct of other employees (in either taking drugs or not) becomes the focal point as to whether an individual may be randomly drug tested in the future. And, similarly, requiring documented evidence within a specific department makes an individual's Fourth Amendment rights substantially dependent on where the employee works. Firefighters in a fire department with a documented drug history may be subject to random testing, but firefighters in adjacent communities without such a history could not be tested. Unlike the decision here, this Court has not made documented drug abuse a prerequisite to random testing. Rather, this Court has put such evidence in a reasonable perspective by observing that such evidence could "shore up an assertion of special need" and could clarify the "precise hazards posed by such use." *Chandler*, 520 U.S. at 319. By making documented drug abuse a prerequisite, the ultimate measure for the constitutionality of a search is no longer the reasonableness of the search, but rather is substantially (and in some cases totally) dependent on other employees' past conduct and the location of employment.

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[3] Brief of the City of Phoenix, the City of Kingman, the City of Peoria, the City of Prescott, the City of Somerton, the City of Yuma, and the League of Arizona Cities and Towns as *Amici Curiae* in Supporting Petitioner ("Cities' *Amicus* Brief") at 6-8;

Fifth, the Arizona Supreme Court's decision indicates that documented evidence of drug abuse within the specific department being tested is a prerequisite. (Pet. App. 8a.)[4] This Court, however, has not made department specific evidence a prerequisite. For example, in *Skinner*, this Court looked at drug abuse within the "railroad industry," and not at each individual railroad company (or specific departments within each company). 489 U.S. at 607-8. By focusing on the specific department being tested, the Arizona Supreme Court's decision creates a balancing test that is dependent on the size of the department and the level of government legislating the testing requirement. For example, a metropolitan city with a large fire department statistically is more likely to have some documentation of drug abuse due to having more employees. And, similarly, if the testing policy is adopted at the state or federal level, it will encompass more people, which increases the probability that there will be some documented drug abuse. *See, e.g., International Brotherhood of Teamsters v. Department of Transportation*, 932 F.2d 1292 (9th Cir. 1991) (federally mandated testing that would affect three million truck drivers).

There is no disputing that on a county,[5] state,[6] and national[7] level there is documented drug abuse within fire departments. The Arizona Supreme Court's opinion incorrectly makes the special needs balancing test, and the reasonableness of a search, substantially dependent on who institutes the testing (e.g. federal, state, or municipal entity).

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[4] Respondent claims that "the Arizona Supreme Court's approach makes sense: A city cannot rationally impose . . . [random drug testing] if there is no history of drug abuse in that fire department." (Opp. 4.)

[5] Cities' *Amicus* Brief, at 17-18.

[6] Brief of *Amici Curiae* The Drexel Heights Fire District and The Northwest Fire District in Support of Petitioner, at 11,13-14, nn. 5 & 6.

[7] Brief of *Amici Curiae* The International Municipal Lawyers Association and The National League of Cities in Support of Petitioner, at 16-18.

Finally, the Arizona Supreme Court's decision conflicts with federal law requiring municipalities to randomly test certain employees—such as gas pipeline workers, solid waste equipment operators, and fleet mechanics. Respondent casts aside this issue by asserting that a state court cannot review federal legislation. (Opp. 23.) This unsupported assertion is contrary to this Court's statement that state courts "possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law." *Asarco Incorporated v. Kadish*, 490 U.S. 605, 617 (1989). Furthermore, Respondent's assertion entirely misses the point that the Arizona Supreme Court's decision calls into question the constitutionality of federal regulations that affect every state and municipality.

The Arizona Supreme Court's decision creates a new (and unworkable) special needs balancing test that is in conflict with this Court's and numerous lower courts' decisions. As stated in the Petition, "[r]eview by this Court is needed to restore a consistent constitutional standard among the states and the federal circuits." (Pet. 6.) The City of Mesa requests that this Court grant the Petition.

Respectfully Submitted,

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